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ALEXANDER L. STEVAS,
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85-25

No. 84-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOANN MORGAN,

Petitioner,

VS.

FIRESTONE TIRE & RUBBER COMPANY,

Respondent.

Petition For Writ of Certiorari To the United States Court of Appeals for the Eleventh Circuit.

WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) WHETHER THE FEDERAL RULES OF EVIDENCE REQUIRE A FOUNDATION OF SIMILARITY BETWEEN AN OUT-OF-COURT EXPERIMENT AND EVENTS IN LITIGATION BEFORE THE TRIAL COURT HAS DISCRETION TO ADMIT THE OUT-OF-COURT EXPERIMENT INTO EVIDENCE.

PARTIES TO THE PROCEEDING

Petitioner, Joann Morgan

Respondent, Firestone Tire & Rubber Company

Andrew J. Ryan, III, Esquire Richard H. Middleton, Esquire Eugene C. Brooks, Esquire Middleton & Anderson, P.C. Attorneys for Petitioner

Charles Stapleton, Esquire Martin, Snow, Grant & Napier Attorneys for Respondent

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOANN MORGAN,

Petitioner,

VS.

FIRESTONE TIRE & RUBBER COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

STATEMENT OF JURISDICTION

(a) Joann Morgan petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Eleventh Circuit. Petitioner seeks the determination of a federal evidentiary issue in which the Circuits are in conflict. Rule 17.1(a), Rules of the Supreme Court of the United States. The original action was filed in the U.S. District Court for the Southern District of Georgia as a wrongful death products liability diversity action. Federal jurisdiction exists under 28 U.S.C. § 1332 (1982).

(b) Judgement of the trial Court was entered on June 28, 1984 by the U.S. District Court for the Southern District of Georgia. A per curiam opinion upholding the trial Court was entered on March 1, 1985 by the United States Court of

Appeals for the Eleventh Circuit. (App. at 1a). Appellant's Petition for Rehearing and Suggestion For Rehearing En Banc were denied on April 5, 1985. (App. at 2a). The Notice of Appeal was filed on April 25, 1985 in the United States Court of Appeals for the Eleventh Circuit. (App. at 4a).

(c) This petition is brought pursuant to 28 U.S.C. 1254(a) which confers jurisdiction on the Supreme Court of the United States and Rule 17.1(a) of the Rules of the Supreme Court of the United States which provides for grant of a writ of certiorari to review conflicts between the U.S. Courts of Appeal.

STATUTES INVOLVED

Federal Rules of Evidence,

Rule 401
Definition of "Relevant Evidence"

"Relevant Evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402.
Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 403.
Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of (1)

unfair prejudice, (2) confusion of the issues, (3) misleading the jury, or (4) by considerations of undue delay, (5) waste of time, or (6) needless presentation of cumulative evidence.

STATEMENT OF THE CASE

Petitioner's husband died on January 4, 1982 at the age of 37, leaving his wife and five daughters. T. at 103-26, 331. Decedent owned a trucking business and was driving one of his trucks loaded with eggs from a processing facility outside of Savannah, Georgia to retail outlets in Savannah. T. at 118-19. The front left tire of the truck blew out after driving approximately 17 miles, causing decedent to lose control and crash into a ditch. T. at 80. The load of eggs fell forward and crushed him to death. T. at 86-89.

Petitioner filed this diversity action in the U.S. District Court. R. 1-8. She alleged that a defect in the tire caused the tire blow-out that caused her husband's death. *Id.* The tire had been manufactured by Seiberling, a subsidiary of Firestone Tire & Rubber Company ("Firestone"). R. 65-66. Firestone, an Ohio Corporation, was named as Defendant. *Id.*

Petitioner's tire expert testified that the blow-out was caused by a defect in the tire which had existed since its manufacture. T. at 208-13. The tire was a Load Range E, Seiberling 4-ply tube type truck tire, size 8.25-10 manufactured in 1978. T. at 207. The defect consisted of foreign matter within the plies of the tire that caused the nylon cords in the plies to heat up, weaken and eventually give way. The continued heating of the cords culminated in the blow-out at the place of contamination. T. at 210.

Respondent's expert testified that the blow-out was caused by chronic underinflation. T. at 374. This chronic underinflation caused the inside cords of the tire to loosen

and fall away from the inside of the tire. T. at 359-62. The tire eventually blew out as the cords weakened. *Id.*

Another expert who had originally been appointed by the Court was called by the Respondent. He agreed with Respondent's first expert. T. at 485.

In support of the testimony of Respondent's first expert, Firestone showed a videotaped film of an out-of-court experiment in which a different tire was blown out under differ ent circumstances. Respondent's Exhibit No. 31; T. at 386, 404. The test tire was also exhibited to the jury. Respondent's Exhibit No. 27, T. at 403-04. This test tire was quite different from the tire in litigation and the differences are set forth below:

Petitioner's Tire in Litigation	*Respondent's Test Tire*
1. Manufactured by Seiberling in 1978.	1. Manufactured by Dayton in 1984.
2. An older tire which had used 70% of its tread.	2. A brand new tire that had been run 100 miles just prior to the experiment.
3. 4-ply tire.	3. 6-ply tire, (50% more ply).
4. Size 8.25-10.	4. Size 8.25-20 (2 sizes larger).
5. Max. load of 4,000 lbs.	5. Max. load of over 6,000 lbs.
(T. at 207, R. 65-66)	(T. at 388-97) (Respondent's Exhibit No. 27)

The out-of-court experiment was conducted under circumstances completely different from the facts in litigation. These differences are set forth below:

Events in Litigation	*Circumstances of Respondent's Experiment*
1. Puncture caused by interior condition.	1. Puncture caused by exterior blade.
2. Medium size truck fully loaded with eggs in trailer.	2. Large truck with empty trailer.
3. Flattened tire went 100 yards through pot holes and crashed into a ditch 6 feet deep.	3. Flattened tire went 300 yards on smoothly paved asphalt surface.
4. Drive by David Morgan.	4. Driven by Firestone employee.
5. Drizzling day in January.	5. Bright, clear, dry day.
(T. at 51-56, 80-84)	(T. at 388-97, Respondent's Exhibit No. 31)

The purpose of Firestone's out-of-court experiment was to impeach Petitioner's theory of the tire defect. R. Vol. 3 at 9; T. at 383, 385-87, 396-97, 409-10, 458. The impeachment centered on the cause of the loose cords on the tire's inside ply next to the tube. R. at 240, 254-56. Petitioner's expert attributed these loose cords to the run flat damage caused by the weight of the truck bearing down on the tire as it went through a parking area full of pot holes. *Id.* Respondent's expert attributed the loose cords to the chronic underinflation of the tire. T. at 385-87.

In the experiment, the test tire was flattened. It was then run on a flat surface without a fully loaded truck bearing down upon it. T. at 388-97. The test tire had no loose cords on the inside of the tire after the experiment. T. at 409-10.

Respondent then claimed proof that the loose cords of the tire in litigation were not the result of run flat damage. T. at 383, 385, 396-97. Relying on these test results, Respondent concluded that the loose cords were caused by underinflation, that underinflation existed, and that, therefore, the blow-out was the result of the underinflation. T. at 385-87, 396-97, 409-10, 458.

Petitioner objected to the admission of the test tire and the videotape of the out-of-court experiment at the Pretrial Conference. R. Vol. 3 at 7-8. The Court delayed ruling. *Id.* at 13-14. On the eve of trial, Petitioner filed a Motion In Limine. R. at 287. During trial, Petitioner raised an objection when Respondent's expert referred to the experiment. T. at 404. Petitioner's objection was based on the lack of similarity between the test tire and out-of-court experiment with the tire and facts in litigation. *Id.*

The Court then viewed the video and voir dired the three trial experts. T. at 388-94. Petitioner's expert explained the major dissimilarities that caused the out-of-court experiment to be misleading. They are as follows:

(1) the test tire was brand new while the subject tire had worn approximately 70% of its tread, therefore, the rubber surrounding the test tire cords was new and less likely to fall away from the cords while the rubber in the tire in litigation was older and more likely to fall away from the cords; T. at 398-401.

(2) the test tire contained more plies and had a thicker tread than the subject tire which provided more protection from the rim crush; *Id.*

(3) the road surfaces over which the tires were run flat were vastly different and caused different results. *Id.*

Respondent's first expert, Mr. Gardner, stated that the dissimilarities made no difference. T. at 397. Mr. Baker, the second expert called by Respondent, stated that the experiment would increase the jury's understanding but noted that the jury should be made aware of the dissimilarities. T. at 401-02. Respondent laid no foundation or made any showing that the out-of-court experiment and test tire were similar to the facts in litigation.

The Court allowed the video into evidence and allowed the test tire to be exhibited to the jury. T. at 404. A cautionary instruction was given to the jury. T. at 405. No ruling of similarity was ever made.

REASONS FOR GRANTING THE WRIT

The Circuits of the U.S. Courts of Appeals are in disarray over this federal evidentiary issue. The issue is whether a foundation of similarity must be laid before evidence of out-of-court experiments may be considered for admission into evidence. The Eighth Circuit has recently overturned a Plaintiff's verdict against Firestone because the trial Court allowed Plaintiff to show the jury a video of an out-of-court experiment of dissimilar events. *Hale v. Firestone Tire & Rubber Co.*, 756 F.2d 1322, 1333 (8th Cir., 1985).

Hale involved personal injury to the Plaintiff, the owner of a trucking company, which occurred when he was inflating a truck tire. *Id.* Plaintiff suffered severe injury to his face and hand when the rim of the wheel on which the tire was mounted separated. The rim was manufactured by Firestone and Plaintiff alleged that it was defective. During trial, Plaintiff informed the jury of two hundred and ten wheel rim injuries involving the same type rim and showed the jury a motion picture of a tire rim accident to demonstrate the force of the explosion. *Hale*, 756 F.2d at 1332-33.

In *Hale*, Firestone objected because the prior accidents reported to the jury and the events in the film were dissimilar to the facts in litigation. *Id.* In regards to the prior accidents, the Court held that the similarities were insufficient as a matter of law, even though the wheel rim in litigation was the same type of wheel rim involved in the prior accidents. *Hale*, 756 F.2d at 1332. The Eighth Circuit stated that "[e]vidence of prior accidents is admissible only if the proponent of the evidence shows that the accidents occurred under circumstances substantially similar to those at issue in the case at bar". *Hale*, 756 F.2d at 1332. The rationale of dissimilarity was also relied upon to bar the motion picture from evidence. *Id.*

The Eighth Circuit pointed to many dissimilarities between the circumstances of the motion picture and the facts in litigation. These dissimilarities are as follows: (1) the rim in the film was not the specific type rim in litigation; (2) the manufacturer of the rim in the film was not shown to be Firestone; (3) the rim in the film had been altered; (4) the inflation of the tire in the film was 80-90 p.s.i. while the tire in litigation was inflated to no more than 55 p.s.i.; (5) the rim in the film had a split ring while the rim in litigation had a continuous ring; and (6) the tire in the film was laying on the ground while the tire in litigation was mounted on a truck. *Hale*, 756 F.2d at 1333. Referring specifically to experimental evidence, the Eighth Circuit stated " [e]vidence of experimental tests is not admissible unless a foundational showing is made that the tests were conducted under conditions substantially similar to actual conditions." *Id.* at 15-16.

The Fourth Circuit ruled likewise in overturning a verdict for General Motors. *Gladhill v. General Motors Corp.*, 743 F.2d 1049, 1051 (4th Cir. 1983). The Fourth Circuit found that General Motors had shown a video of an out-of-court experiment conducted under dissimilar circumstances

which caused the evidence to be "irrelevant if not misleading." *Id.* at 1051. Plaintiff claimed his car's brakes malfunctioned on a curve and caused him to skid and collide into a utility pole. Defendant showed a video of the same model car's brakes locking on a straightaway with a test driver in control. *Gladhill*, 743 F.2d at 1051. General Motors submitted the evidence only for demonstrative purposes. *Id.* The Fourth Circuit noted that any evidence could be labeled demonstrative and held that the prejudicial effect of the video, due to the dissimilarity between the test and the facts in issue, outweighed the probative value of the evidence. *Id.* at 1052. The trial court was reversed. *Id.*

In a conflicting decision, the First Circuit has ruled that the dissimilarity of out-of-court experiments goes to the weight rather than the admissibility of the evidence. *Szeliga v. General Motors Corp.*, 728 F.2d 566, 567 (1st Cir., 1984). In *Szeliga*, General Motors showed two video films of dissimilar vehicles striking an object in a manner dissimilar to the facts in litigation. *Id.* The facts are straightforward. Plaintiff's car went off the road, struck a culvert and crashed into a group of trees. *Id.* Plaintiff claimed that the left front wheel disconnected from the axle and caused the accident. *Id.* General Motors claimed that Plaintiff carelessly ran into the culvert and knocked the wheel off. General Motors showed a film of a wheel and wagon assembly hitting a cement barrier to illustrate expert testimony. *Id.* In the film the wheel was knocked off when it smashed into the cement. *Id.*

The Eleventh Circuit did not explain its rationale for upholding the trial Court's admission of evidence without requiring similarity. However, it has implicitly followed the *Szeliga* rule. The seeming arbitrariness of the Courts on this issue leaves every litigant in limbo on this increasingly crucial point of evidence. With the Circuits on their diverg-

ing paths, a writ should issue to clarify this federal evidentiary matter.

I. Relevancy Requires a Foundation of Similarity

The Federal Rules of Evidence require that evidence be relevant and that it outweigh dangers of prejudice, confusion or waste of time. FED. R. EVID. 401, 402, 403. These rules have received various interpretations from the Circuits regarding the admissibility of evidence of out-of-court experiments. The liberal interpretation of *Szeliga* allows a litigant to put any experiment, no matter how remote, into evidence. *Hale* and *Gladhill* require the experiment to have substantial similarity with the facts in litigation.

The test of similarity is grounded in relevancy. 11 J. MOORE, MOORE'S FEDERAL PRACTICE, 703:30 (1982). The federal rules require relevancy. FED. R. EVID. 402. The simplest and most logical way to ensure compliance with the rules is to require the admitting party to law a foundation of similarity. *Hale*, 756 F.2d at 1332-33. Foundations are commonplace thresholds which must be satisfied before evidence may be considered for admissibility. E. IMWINKELRIED, EVIDENTIARY FOUNDATIONS (1980).

In the case at bar, Firestone would be required to show that the test tire and the circumstances of the experiment were similar to the tire and facts in litigation. This showing allows the Court to consider relevancy. This requirement is not burdensome and quickly narrows the opportunity for abuse of the federal evidentiary rules.

II. Disuniformity of Opinions from the U.S. Courts of Appeal Have Destroyed Valid Judicial Discretion

Evidence is often a discretionary matter for the trial Court. 1 J. WEINSTEIN & M. BERGER, WEIN-

STEIN'S EVIDENCE, 403 [05] at 403-09 (1983). However, judicial discretion requires guidance by fixed legal principles and precedents. 1 WIGMORE, EVIDENCE § 16 at 310 (Chadbourn rev. 1979). If legal principles and precedents are not followed, then discretion gives way to arbitrariness.

The circuits have dealt with this evidentiary issue in various ways. Some circuits have allowed dissimilar experiments as illustrative evidence but bar them as reconstructions of the facts in litigation. *Barnes v. General Motors Corp.*, 547 F.2d 275, 276, 277 (5th Cir. 1977) (barred as reconstruction); *Young v. Illinois Central Gulf R. Co.*, 618 F.2d 332, 337-38 (5th Cir., 1980) (allowed as illustrative); *Miller's National Ins. Co. v. Wichita Flour Manufacturing Co.*, 257 F.2d 93, 99 (10th Cir., 1958) (allowed as illustrative); *Jackson v. Fletcher*, 647 F.2d 1020, 1026-28 (10th Cir., 1981) (barred as reconstruction).

The opinions have created a dichotomous approach to the issue which can be confusing. In *Young*, the Fifth Circuit noted the many similarities between the submitted motion picture and the facts in litigation and allowed the motion picture as illustrative evidence. *Young*, 618 F.2d at 337-38. The Tenth Circuit has allowed a motion picture to illustrate a physical principle upon which causation hinged. *Miller National*, 257 F.2d at 99. This motion picture showed an explosion of a structure, the cause of which was the central issue. *Id.* However, in *Barnes* and *Jackson*, the evidence of out-of-court experiments closely resembling the facts in litigation was barred because dissimilarities caused the evidence to be irrelevant and misleading. *Barnes*, 547 F.2d at 277; *Jackson*, 647 F.2d at 1026-28.

Prior to the *Hale* decision, the Eighth Circuit was also following this dichotomous path. *Randall v. Warnaco, Inc.*,

Hirsch-Weiss Div., 677 F.2d 1226, 1234, n. 7 (8th Cir., 1982). In *Randall*, the Defendant introduced a videotaped experiment of a camping accident. *Id.* The Court voiced concern with the video tape's admissibility even though objection had been waived. *Id.* The Court explained its understanding of the dichotomy and apparently would have barred the evidence if an objection had been made. *Id.*

The Fourth Circuit has refused to recognize the dichotomy in *Gladhill*, 743 F.2d at 1051. It quickly pointed out the semantic game that was being played by litigants. *Id.* at 1051. The Eighth Circuit has now followed the Fourth Circuit and is requiring substantial similarity of out-of-court experimental evidence. *Hale*, 756 F.2d at 1332-33. The Eleventh Circuit has not articulated its rule. With so many differing solutions to the issue, the Eleventh Circuit may feel that there is no need to create yet another one.

Petitioner asserts that one federal rule is good enough for all litigants. The *Hale* decision was decided and filed three weeks prior to the Eleventh Circuit's denial of Petitioner's rehearing. It is puzzling why Firestone should be treated differently on the same evidentiary issue in two different circuits. *Hale*, 756 F.2d at 1332-33; *Morgan v. Firestone Tire and Rubber Co.* No. 84-8569 (11th Cir. April 4, 1985). The answer to the puzzle is that no rule of admissibility now exists and discretion has given way to arbitrariness.

III. Conflicting Interpretations of Federal Rules of Evidence 401, 402 and 403 Adversely Affect Judicial Economy and Uniformity of Federal Law.

The Eleventh Circuit, following *Szeliga*, and the Eighth Circuit, in *Hale*, have adopted conflicting constructions of the Federal Rules of Evidence. No policy favors further "percolation" of the doctrine in the Courts of Appeal. On the contrary, continuing conflict in interpretation of the Federal

Rules will result in judicial expense and prejudice to parties from disuniform application of federal law.

As Justice Walter V. Schaefer (retired) has noted, the need for judicial uniformity underlies the judicial Article of the Constitution. W. Schaefer, "Reducing Circuit Conflicts", 69 ABA J. 452, 453 (1983). Particular litigants suffer injury to their legal rights until conflict between circuits is resolved, because the conflict results in improper or incorrect application of federal law to some litigants. *See Martin v. Hunter's Lessee*, 1 Wheat. 304 (1816) (Story, J.) (conflicting interpretations of federal law by state courts cause injustice to individuals and society). In addition, the continuation of a conflict adds to the burden of litigation in circuits where federal evidentiary law has not yet been construed with respect to experimental evidence.

Of course, some conflict between courts may be favorable to development of legal doctrine. *United States v. Mendoza*, ____ U.S. ____, 78 L Ed 2d 379, 104 S. Ct. ____, No. 82-849, slip op. at 6 (U.S. Jan. 10, 1984); *see also United States v. Stauffer Chemical Co.*, ____ U.S. ____, 78 L Ed 2d 388, 104 S. Ct. ____, No. 82-1448, slip op. at 4-5 (U.S. Jan. 10, 1984) (White, J., concurring) . In the present case, however, the conflict is ripe for resolution. The First Circuit adopted one interpretation of the Federal Rules in *Szeliga*. One year later, the Eighth Circuit advanced a conflicting interpretation in *Hale*. The Eleventh Circuit disregarded *Hale*, apparently rejecting the development in legal doctrine that *Hale* had advanced.

Further intercircuit conflict will not promote wise adjudication of this issue. On the contrary, further conflict will lead to unnecessary litigation in the remaining Courts of Appeal, and to disuniformity of federal law prejudicial to litigants.

IV. The Logic of Evidence Requires A Foundation of Substantial Similarity

Wigmore has addressed the need for substantial similarity between experimental evidence and issues in litigation. WIGMORE, *supra.* at § 33. This authority has noted that legal proof is always inductive, and the quality of the fact finder's inductions depends on the evidence presented to it. *Id.* Wigmore requires that tests for admissibility of evidence "secure a fair probability for the claimed hypothesis as against and in competition with other claimed ones." *Id.* at 423.

Wigmore sets forth two methods of inductive proof: (1) Method of Agreement and (2) Method of Difference. *Id.* at § 33. In the method of agreement, a litigant trying to prove that "a" is the cause of the effect "b", may show that when "a^1", "a^2", and "a^3" occur, "b^1", b^2", and "b^3" also occur. *Id.* at 422. In the method of difference, a litigant trying to prove that "x" is the cause of "b", may demonstrate that when "x" occurs, "b^1", "b^2" and "b^3" occur and when "x" does not occur, then "c" and "d" occur. *Id.* at 422-23. With a quick application of inductive logic, the litigant may use the above methods to aid in his proof. However, substantial similarity between the "a" and "x" in litigation and the "a" and "x" of the experiments is essential to the admissibility of the evidence. *Id.*

The jurors will learn something from any out-of-court experimental evidence. However, the law of evidence regularly excludes evidence which increases knowledge that is irrelevant, misleading and unduly prejudicial. FED. R. EVID. 402, 403. Evidentiary law controls the knowledge that is imparted to jurors. Without this control, the inductive reasoning that the jury must make is skewed and unreliable. The simple solution to this danger posed by experiment evidence is to require substantial similarity.

Petitioners are not asserting that every experiment submitted to illustrate or support expert testimony must be

performed under circumstances identical to the facts in litigation. The proposed requirement is only for substantial similarity. The reliability of these experiments must be of concern. The easy and frequent use of videotapes portends the frequent use of out-of-court experiments in criminal as well as civil suits. The use of experimental evidence in an increasingly scientific society is attractive to all litigants. The videotaping of such experiments to support theories and the submission of materials used in the experiment as evidence is no doubt valuable to a jury. However, this Court must establish some uniform evidentiary rule so that true judicial discretion can be exercised in federal proceedings.

CONCLUSION

The Circuits of the U.S. Court of Appeals are in conflict on this federal issue. As a result, litigants in federal trial Courts are facing varied interpretations of federal evidence law. The varied interpretations belie the existence of any uniform principle or precedent. Without a uniform legal principle or precedent from which to rule, neither uniform treatment nor judicial discretion is possible. Arbitrariness then fills the void and begets injustice.

Petitioner respectfully requests this Honorable Court to issue a writ of certiorari to consider this federal evidentiary issue based on its authority to review conflicts between the U.S. Courts of Appeal. In resolving these conflicts, Petitioner respectfully requests this Honorable Court to establish a requirement that the submitting party lay a foundation of substantial similarity before evidence of out-of-court experiments may be considered for admissibility.

Respectfully submitted,

ANDREW J. RYAN, III

RICHARD H. MIDDLETON, JR.

EUGENE C. BROOKS

Attorneys for Petitioner

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 84-8569

JOANN H. MORGAN, Individually,
and as ADMINISTRATRIX of the
ESTATE OF DAVID W. MORGAN,
Deceased,

Plaintiff-Appellant,

VERSUS

FIRESTONE TIRE AND RUBBER COMPANY,

Defendant-Appellee.

**APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA**

(March 1, 1985)

Before TJOFLAT and VANCE, Circuit Judges, and ATKINS*, District Judge.

PER CURIAM:

AFFIRMED. See Circuit Rule 25.

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*Honorable C. Clyde Atkins, U.S. District Judge for the Southern District of Florida, sitting by designation.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-8569

JOANN H. MORGAN, Individually,
and as ADMINISTRATRIX of the
STATE OF DAVID W. MORGAN,
Deceased,

Plaintiff-Appellant,

VERSUS

FIRESTONE TIRE AND RUBBER COMPANY,

Defendant-Appellee.

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
APR 4 1985
SPENCER D. MERCER
CLERK

Appeal from the United States District Court for the Southern District of Georgia

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion March 1, 11 Cir., 1985, ____ F.2d ____).
(April 5, 1985)

Before TJOFLAT and VANCE, Circuit Judges, and ATKINS*, District Judge.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

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*Honorable C. Clyde Atkins, U.S. District Judge for the Southern District of Florida, sitting by designation.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-8569

JOANN H. MORGAN, Individually,
and as ADMINISTRATRIX of the
ESTATE OF DAVID W. MORGAN,
Deceased,

Plaintiff-Appellant,

VERSUS

FIRESTONE TIRE AND RUBBER COMPANY,

Defendant-Appellee.

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
APR 25 1985
SPENCER D. MERCER
CLERK

NOTICE OF APPEAL

COMES NOW Appellant in the above-captioned lawsuit and appeals the denial of her Petition for Re-hearing and Suggestion for Re-hearing En Banc filed on April 4, 1985

in the U.S. Court of Appeals for the Eleventh Circuit. Appellant Joann H. Morgan seeks review of this decision pursuant to 28 USC § 1254(1).

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